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Supreme Court, U.S.
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No. 99-1650

In the

Supreme Court of the United States

MARSHALL SPIEGEL,

Petitioner,

v.

DET. JOSEPH CORTESE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a district court's refusal to afford an arresting officer qualified immunity on a claim that an arrest lacked probable cause is subject to independent review on appeal when the qualified immunity inquiry turns on application of legal principles and not a disputed issue of underlying historical fact.

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STATEMENT

On June 25, 1993, petitioner Marshall Spiegel was arrested by the respondent, Detective Joseph Cortese of the Chicago Police Department, and charged with battery. Tr. 6/30/97 at 181-87.[1] Det. Cortese made the arrest based upon a complaint by Loren Cherny ("Cherny"), petitioner's upstairs neighbor, who came to the police station where Det. Cortese was working and told him about an altercation that had occurred on May 29, 1993. Tr. 7/1/97 at 323-26. Cherny was accompanied by the woman he lives with, Min Bobin ("Bobin"), who was also present during the altercation. Tr. 7/1/97 at 523.

Cherny and Bobin, who were in their seventies, lived in a high-rise apartment building, Hollywood Towers, located at 5701 North Sheridan Road in the City of Chicago. Tr. 7/2/97 at 523. They moved into Apartment 8J in January 1993 and from the time they moved in, the neighbors in the apartment below them—petitioner and his wife, who lived in Apartment 7J—had complained that Cherny and Bobin were making too much noise. *Id.*; Tr. 7/1/97 at 293. At the time, petitioner was 36 years old, and his wife was 42. Tr. 6/30/97 at 121. Cherny and Bobin believed that the complaints were unjustified and

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[1] Battery is a Class A misdemeanor under Illinois law, pursuant to 720 ILCS 5/12-3 (1998), which provides in relevant part:

> (a) A person commits battery if he intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual.

they had complained to the condominium association that petitioner was harassing them. Tr. 7/2/97 at 524. The condominium association investigated and sided with Cherny and Bobin, finding that the complaints were unfounded. Tr. 7/2/97 at 525.

On May 29, 1993, at about 6 p.m., Carol Spiegel knocked on the door to Cherny and Bobin's apartment. Tr. 7/1/97 at 296; Tr. 7/2/97 at 527-28. She was upset about noise that was keeping her from taking a nap. Tr. 7/1/97 at 295. Petitioner also walked up the stairs from the seventh floor to the eighth floor, carrying his seventeen-month-old son, and stood at the staircase, about 10 or 12 feet from the Cherny and Bobin apartment door. Tr. 7/1/97 at 208-09; Tr. 7/2/97 at 527. Cherny and Bobin denied making noise, and suggested that the noise might be coming from further upstairs. Tr. 7/1/97 at 141, 297; Tr. 7/2/97 at 528. Carol Spiegel ran upstairs to check, then returned, and said that Bobin was a liar because no one was home in Apartment 9J. Tr. 7/1/97 at 141-43, 301; Tr. 7/2/97 at 528. Cherny and Bobin claimed that at that point petitioner had become very angry and came right up to Cherny, backing him against the wall; he told Cherny, "come on, hit me, you old fart." Tr. 7/2/97 at 530. Petitioner acknowledged that he had said this to Cherny. Tr. 7/1/97 at 140, 219. According to Cherny, petitioner was so close to him that his spittle sprayed Cherny's glasses. Tr. 7/2/97 at 530. Cherny also testified that petitioner kneed him on the inner thigh, producing a bruise that Cherny later showed Det. Cortese. Tr. 7/1/97 at 326, 367; Tr. 7/2/97 at 530-31. Petitioner and his wife testified that Cherny shoved petitioner but that petitioner did not hit, knee, or kick Cherny. Tr. 7/1/97 at 138, 140, 298. Meanwhile, Bobin had turned to try to reenter

their apartment, but she discovered that they had locked themselves out. Tr. 7/1/97 at 384-85; Tr. 7/2/97 at 530.

During the incident a neighbor, Hanan Hughes ("Hughes"), heard the yelling and came out of her apartment into the hallway. Tr. 7/1/97 at 266. She called out to ask if everything was all right. Tr. 7/1/97 at 271. Hughes testified that the Spiegels, Cherny, and Bobin were all yelling back and forth during the incident. Tr. 7/1/97 at 270. She came out because she is a nurse and was concerned that Cherny, an old man, might have a heart attack. Tr. 7/1/97 at 272. Hughes saw Cherny push petitioner and heard Cherny say, "You shouldn't have tried to kick me." Tr. 7/1/97 at 271. Petitioner also turned toward Hughes and said: "You see what happens when you let Jews move into the building." Tr. 7/1/97 at 141, 273, 302; Tr. 7/2/97 at 530-31. The doorman, who had been called to the scene by another neighbor, then herded the Spiegels back toward their apartment and told Bobin she could get a key from downstairs to reenter her apartment. Tr. 7/2/97 at 530-31. Petitioner testified that he told the doorman that he was embarrassed that fellow Jews would act this way. Tr. 7/1/97 at 223.

On May 31, 1993, petitioner filed a police report at the 10th District police station in which he alleged that during the May 29th dispute, Bobin and Cherny both shoved him. Tr. 6/30/97 at 147-48. On June 21, 1993, petitioner went to the Area Three police station and told Sgt. Kajari that he wanted to file charges against Cherny and Bobin. Tr. 6/30/97 at 157-58. On June 23, 1993, petitioner returned to the Area Three police station and swore out a complaint against Cherny and Bobin for battery, based upon the May 29th incident. Tr. 6/30/97 at

160-61. Petitioner testified that the warrant clerk told him that he would mail summonses to Cherny and Bobin. Tr. 6/30/97 at 163.

Cherny and Bobin went to the police station on June 25 to file a report on the May 29 incident. Tr. 7/1/97 at 323. Sgt. Kajari assigned Det. Cortese to investigate that report. Tr. 7/1/97 at 323. Det. Cortese interviewed Cherny and Bobin on June 25. Tr. 7/1/97 at 323. They told Det. Cortese that the Spiegels had knocked on their door at about 6:00 p.m., and when they opened it, Carol Spiegel began screaming at them about the noise that she claimed was coming from their apartment. Tr. 7/1/97 at 383-84; Tr. 7/2/97 at 527-28. Petitioner, holding his child, moved close to Cherny's face and dared Cherny to hit him. Tr. 7/2/97 at 530. Petitioner then struck Cherny on the inner thigh with his knee. Tr. 7/2/97 at 530-31. Cherny and Bobin told Det. Cortese that they were frightened of petitioner. Tr. 7/1/97 at 388. When Cherny spoke to Det. Cortese, he showed him photographs of his bruised thigh that were taken soon after the incident, as well as the bruise itself, Tr. 7/1/97 at 370, 386, 447; Tr. 7/2/97 at 539-41. Cherny also gave Det. Cortese a report that Bobin had written describing the incident to the condominium association. Tr. 7/1/97 at 335-36; Tr. 7/2/97 at 536. Det. Cortese testified that he believed Cherny and Bobin, as did Det. Hennelly, the other officer who was present when Det. Cortese interviewed Cherny and Bobin. Tr. 7/2/97 at 452.

Det. Cortese then reviewed petitioner's May 31 police report and learned that there had been an ongoing dispute between the Spiegels and Cherny and Bobin, and that petitioner had claimed that Cherny and Bobin had

shoved and threatened him on May 29. Tr. 7/1/97 at 321, 332-34. He also reviewed documents Cherny and Bobin had provided to him reflecting complaints each side had made about the other to the condominium association. Tr. 7/1/97 at 335, 340, 380-82.

Later, on June 25, Det. Cortese called the Spiegel residence and spoke to Carol Spiegel, who said that petitioner was not there. Tr. 6/30/97 at 166-67; Tr. 7/1/97 at 304-06, 390-91. Det. Cortese told her that it was urgent that he speak to petitioner, and that if petitioner did not call him he would be arrested, but he did not question Carol Spiegel about the incident. *Ibid.* Soon, petitioner called back, and Det. Cortese told him that Cherny had charged him with battery, that he was subject to arrest, and that he should come to the station to post bond. Tr. 6/30/97 at 168-70. Petitioner told Det. Cortese that he had filed charges two days earlier against Cherny and Bobin, and that Cherny's charges against him were merely retaliatory. Tr. 6/30/97 at 170-72. He added that Cherny and Bobin had shoved him and that there were witnesses who would support his version of events, although he did not identify the witnesses. *Id.* at 175; Tr. 7/1/97 at 259. Det. Cortese, then advised petitioner of his rights and told him to get a lawyer. Tr. 6/30/97 at 176. Petitioner then asked to speak to Sgt. Kajari, to whom he repeated his version of events. Tr. 6/30/97 at 167-68. Sgt. Kajari said that he would not interfere with Det. Cortese's investigation. Tr. 6/30/97 at 169, 177-78.

Petitioner hired a criminal defense lawyer, Patrick Tuite ("Tuite"), to represent him in the criminal case. Tr. 6/30/97 at 180. Later that day, Tuite telephoned Det. Cortese and told him that petitioner would provide no

more information to the police. Tr. 7/1/97 at 393. Petitioner and Tuite then went to the police station, and he was arrested for battery. Tr. 7/1/97 at 402-04.

Petitioner was acquitted of the charge against him after a trial by jury. See Pet. App. 6a. Petitioner then brought suit pursuant to 42 U.S.C. § 1983 against Det. Cortese, four other Chicago police officers, and an employee of Chicago's Department of Aging, as well as the City of Chicago itself, alleging that the individual defendants participated in his arrest without probable cause in violation of the Fourth Amendment and that the arrest was conducted pursuant to an unconstitutional policy or custom of the City of Chicago. See Pet. App. 3a. The district court dismissed petitioner's claims against four of the individual defendants, as well as his claims against the City itself, but refused to dismiss the claims against Det. Cortese and Sgt. Kajari. See Pet. App. 19a-35a. Sgt. Kajari and Det. Cortese subsequently moved for summary judgment on the basis of qualified immunity, but that motion was denied. See Pet. App. 62a-67a.

The case was tried to a jury, which returned a verdict in favor of Sgt. Kajari but against Det. Cortese in the amount of $5,000. R. 60, 61, 62. In his post-trial motion, Det. Cortese sought judgment as a matter of law based on qualified immunity, but the district court again rejected that defense. See R. 75.

The court of appeals reversed. After observing that a district court's ruling on qualified immunity should be reviewed de novo on appeal (Pet. App. 9a), the court observed that "qualified immunity applies not only to those officials who correctly determine that probable cause to arrest exists, but also to those governmental

officials who reasonably but mistakenly conclude that it does." Pet. App. 10a. The court added: "In this context, the law tolerates reasonable error because 'officials should not err always on the side of caution because they fear being sued.'" *Ibid.* (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)). In this case, the court concluded that an arresting officer could have reasonably concluded that there was a sufficient basis to arrest petitioner based on Cherny's statements, under the general rule that an allegation from one who claims to have been the victim of a crime supplies probable cause, see Pet. App. 10a-11a, and here, "Cherny's statement to Cortese that he had been struck by a man 37 years his junior, the bruise he displayed and the account of the escalating conflict with Spiegel provided ample grounds for Cortese to believe that Spiegel had committed battery," Pet. App. 11a. While the court acknowledged that the petitioner had adduced evidence that impeached the credibility of Cherny and Bobin, the court concluded that a reasonable officer could properly have determined that these issues of credibility did not, as a matter of law, negate the existence of probable cause to arrest. See Pet. App. at 12a-13a. Instead, the court reasoned it was settled law that "[t]he credibility of a putative victim or witness is a question, not for police officers in the discharge of their considerable duties, but for the jury in a criminal trial." Pet. App. 13a.

ARGUMENT

Petitioner's submission rests entirely on the jury's verdict that Det. Cortese lacked probable cause to arrest him. He argues: "Once the jury made its factual findings and determined that there was no probable cause to

arrest petitioner, the reviewing court could not revisit that determination *de novo*, and simply substitute its own conclusion for the jury's verdict." Pet. 7. That submission is easily answered by reference to two settled principles: first, the question of qualified immunity is one of law for the court rather than the jury to decide; and second, when the court of appeals must determine whether a constitutionally mandated evidentiary threshold has been satisfied—such as whether probable cause exists to support an arrest—the court must engage in independent appellate review. Accordingly, the court of appeals properly engaged in independent review here when deciding whether the facts confronting Det. Cortese could have led a reasonable police officer to believe that he had probable cause to arrest petitioner—the touchstone for qualified immunity.

Petitioner is correct that when a case turns on some underlying disputed issue of historical fact, rather than the question whether the constitutionally mandated evidentiary threshold has been surmounted, deference to the trier of fact is warranted. But here petitioner has not identified any underlying dispute of historical fact on which the court of appeals failed to defer to the jury's verdict. For that reason, the judgment below was correct, and in any event presents no question warranting plenary review.

1. As this Court has explained, when evaluating the scope of appellate review, there is a critical difference between a determination of historical fact and a determination whether a quantum of evidence meets the constitutional standard. See, e.g., *Ornelas v. United States*, 517 U.S. 690, 696-97 (1996); *Thompson v. Keohane*, 516 U.S.

99, 111-16 (1995). Findings of pure historical fact are reviewed deferentially on appeal, e.g., *Ornelas*, 517 U.S. at 699, but whether a constitutionally mandated evidentiary threshold is satisfied is reviewed de novo, e.g., *id.* at 696. In *Ornelas*, for example, this Court confronted the same question that was before the jury here—the existence of probable cause to make a search or seize a person—and held that "[i]ndependent review [is] . . . necessary if appellate courts are to maintain control of, and to clarify legal principles." *Id.* at 697. This case illustrates the Court's point. The dispositive legal question here is whether police officers may make arrests based on the accounts of a putative victim even when there are factors present that tend to impeach the victim's credibility. That is surely an issue on which uniform guidance from appellate decisions is critical. Under *Ornelas*, then, Det. Cortese was entitled to independent appellate review of the jury's probable cause determination.

The justification for independent appellate review is especially clear in a case such as this, where the question the court of appeals actually decided was the separate legal issue whether Det. Cortese was entitled to qualified immunity for his probable cause determination. As this Court has repeatedly held, an official is entitled to this second layer of protection, even when the plaintiff's constitutional rights have been violated, unless his conduct was objectively unreasonable in light of then-prevailing law. See, e.g., *Wilson v. Layne*, 526 U.S. 603, 614-15 (1999); *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Qualified immunity will therefore protect "all but the plainly incompetent or those who knowingly violate the law," *Malley v. Briggs*, 475 U.S. 335, 341 (1986)—not merely those who have not violated the plaintiff's rights.

Accordingly, even if the court of appeals were prepared to announce a new rule forbidding arrests when there are reasons to doubt a complaining witness's credibility, qualified immunity prevents imposition of liability simply because an arresting officer failed to anticipate the creation of that rule.

Indeed, qualified immunity plays a particularly important role in the context of probable-cause determinations. That is because the standard for probable cause is "not readily, or even usefully, reduced to a neat set of legal rules." *Ornelas*, 517 U.S. at 695 (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)). And "because the mosaic which is analyzed for a . . . probable-cause inquiry is multifaceted, 'one determination will seldom be a useful 'precedent' for another.'" *Id.* at 698 (quoting *Gates*, 461 U.S. at 238 n.11) (citation omitted). Thus, officers will frequently confront circumstances in which they can reasonably entertain doubt about whether a reviewing court will find probable cause to be present. Where such doubt exists, qualified immunity is available. For example, in *Hunter v. Bryant*, this Court expressly held that arresting officers "who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity." 502 U.S. at 227 (quoting *Anderson*, 483 U.S. at 641).[2]

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[2] On this basis, every circuit has concluded since *Hunter* that qualified immunity is available against claims of arrest without probable cause where the arresting officers can demonstrate that their probable-cause determinations were not unreasonable under then-existing law. See, e.g., *Paff v. Kaltenbach*, 204 F.3d 425 (3d Cir. 2000); *Martinez v. Simonetti*, 202 F.3d 625, 634-36 (2d Cir. 2000); *Fletcher v. Town of Clinton*, 196 F.3d 41, 53 (1st Cir. 1999); *Wollin v. Gondert*, 192 F.3d 616, 620

(continued...)

Qualified immunity, it is settled, presents a question of law for the court to review de novo. See, e.g., *Elder v. Holloway*, 510 U.S. 510, 516 (1994). Indeed, that was the standard employed by this Court when evaluating qualified immunity in *Hunter*. See 502 U.S. at 228. That standard makes good sense here. The defense of qualified immunity presented here required the court to determine whether Det. Cortese's decision to arrest petitioner was reasonable in light of established law. Of course, a jury will have no competence to evaluate an officer's decision to make an arrest in light of then-established law; and that supplies even more reason for independent appellate review than was present in *Ornelas*. Accordingly, the court of appeals properly refused to defer to the jury's determination on probable cause when assessing the defense of qualified immunity.

2. For his part, petitioner says not a word about *Ornelas*, concedes that the question whether a defendant is entitled to qualified immunity is an issue of law for a court to consider on appeal de novo (Pet. 9), and contends only that deference to the trier of fact is required "if the nature of the conduct is disputed." *Ibid.* We have no quarrel with that portion of petitioner's submission. As

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[2] (...continued)
(7th Cir. 1999); *Redd v. City of Enterprise*, 140 F.3d 1378, 1382 (11th Cir. 1998); *Greene v. Reeves*, 80 F.3d 1101, 1105 (6th Cir. 1996); *Habiger v. City of Fargo*, 80 F.3d 289, 295-97 (8th Cir.), cert. denied, 519 U.S. 1011 (1996); *Albright v. Rodriguez*, 51 F.3d 1531, 1534-37 (10th Cir. 1995); *Gibson v. Rich*, 44 F.3d 274-277 (5th Cir. 1995); *Rowland v. Perry*, 41 F.3d 167, 174 (4th Cir. 1994); *Wardlaw v. Pickett*, 1 F.3d 1297, 1304-05 (D.C. Cir. 1993), cert. denied, 512 U.S. 1204 (1994); *Act Up! / Portland v. Bagley*, 988 F.2d 868, 872-73 (9th Cir. 1993).

we explain above, *Ornelas* acknowledges that when there are underlying disputes of historical fact, the resolution of those disputes by the trier of fact is entitled to deference on appeal. Here, however, petitioner fails to identify any such disputes. The court of appeals did not question petitioner's account of the underlying historical facts; indeed, it acknowledged each of the factors that petitioner claimed impeached the credibility of the individuals who had accused him of battery. See Pet. App. 11a-13a. The court simply concluded that these doubts about credibility did not establish that Det. Cortese acted unreasonably in light of then-settled law when he concluded that these questions of credibility were properly left for trial and did not negate his authority to make an arrest. Petitioner does not even quarrel with this legal principle.

Petitioner's failure to identify any dispute of historical fact that was material to the decision below, or any respect in which the court of appeals failed to credit any of the evidence he adduced, is fatal to his claim of error here.[3] In fact, the decisions on which petitioner relies to suggest that there is a conflict in the circuits on the deference to be granted to the trier of fact in qualified-immunity cases are readily reconciled with the decision below precisely because those cases involved disputes of underlying historical fact that had been resolved by the trier of fact adversely to the defendant. See *Acosta v. City*

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[3] Indeed, when considering the defense of qualified immunity, the Seventh Circuit has acknowledged the distinction between disputes of historical fact and claims based on the existing state of the law. See *Humphrey v. Staszak*, 148 F.3d 719, 725-28 (7th Cir. 1998).

& County of San Francisco, 83 F.3d 1143, 1146-48 (9th Cir.) (numerous disputes about what occurred before officer shot at decedent), cert. denied, 519 U.S. 1009 (1996); *Karnes v. Skrutski*, 62 F.3d 485, 494-95 (3d Cir. 1995) (disputed facts involved what defendant officers knew prior to arrest); *Posr v. Doherty*, 944 F.2d 91, 96 (2d Cir. 1991) (officers' account of arrest was disputed by other witnesses). See also *Street v. Parham*, 929 F.2d 537, 540-41 & n.2 (10th Cir. 1991) (no discussion of whether underlying disputes of historical fact were present).[4] Thus, there is neither error nor conflict between the circuits here.

3. Petitioner also suggests that this case presents the question that the court granted certiorari to review in *Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1998), cert. dismissed, 119 S. Ct. 1493 (1999). Snyder, however, presented no question of the scope of appellate review, since in that case both the question whether the defendant officers were guilty of excessive force and the question whether they were entitled to qualified immunity were submitted to the jury, and the court of appeals chose to

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[4] The same point disposes of petitioner's reliance on *Frazell v. Flanigan*, 102 F.3d 877 (7th Cir. 1996), a prior Seventh Circuit decision, in which the court deferred to the trier of fact's determination on underlying disputes of historical fact. See *id.* at 886-87. In fact, the Seventh Circuit has expressly limited *Frazell* to cases involving disputes of historical fact. See *Humphrey*, 148 F.3d at 725-26. The other Seventh Circuit case on which petitioner relies appears to be infected by the Seventh Circuit's prior view that probable-cause determinations should be reviewed deferentially on appeal, a view that this Court rejected in *Ornelas*. See *Maxwell v. City of Indianapolis*, 998 F.2d 431, 434-36 (7th Cir. 1993).

reconcile apparently inconsistent verdicts in favor of qualified immunity. See *id.* at 801.[5] Indeed, *Snyder* is doubly distinguishable because it involved an excessive-force claim rather than a probable-cause claim, and for that reason at least arguably did not fall within the scope of review required by *Ornelas*. Accordingly, even if this Court ultimately decides to review another case that presents the question that the Fifth Circuit acknowledged in *Snyder* had divided the circuits—whether a jury's finding of excessive force will necessarily preclude the defense of qualified immunity—this case is not an appropriate vehicle for resolving that dispute.[6]

In fact, *Snyder* itself involved significant disputes of underlying historical fact. See 142 F.3d at 794. Here, however, as we explain above, petitioner cannot identify any dispute of historical fact on which the court of appeals failed to defer to the verdict, nor can he identify any manner in which the court of appeals failed to credit any of the evidence that he adduced at trial. Thus, even if *Snyder* were incorrectly decided, that error casts no doubt on the holding below.

Finally, even petitioner does not contend that questions of qualified immunity must be reviewed deferentially on

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[5] Indeed, the two questions presented for review in the petition for certiorari in *Snyder* both involved the manner in which apparently inconsistent jury verdicts should be resolved. See Original Brief of Petitioner at I, *Snyder v. Trepagnier*, No. 98-507 (Feb. 25, 1999).

[6] In *Snyder*, the court of appeals acknowledged that other circuits had "take[n] the position that a finding of excessive force precludes a finding of qualified immunity." 142 F.3d at 801 n.10.

appeal absent some underlying dispute of historical fact; instead, he acknowledges that qualified immunity is ordinarily a question of law for the court to decide de novo, with the jury limited to "decid[ing] disputed factual issues relevant to that determination." Pet. 9. Thus, at most, the dispute here, unlike in *Snyder*, is quite narrow—whether this record reflects some underlying issue of historical fact on which the court of appeals failed to defer to the verdict. That limited and heavily fact-bound question plainly does not present any issue of widespread significance warranting this Court's plenary review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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